In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SUE ERSKINE NEWMAN, ADMINISTRATRIX of the estate of Ursula Ragland Erskine, deceased, David F. Houston, Secretary of the Treasury, and John Burke, Treasurer of the United States, appellants,

v.

IDA M. MOYERS AND CHARLES F. CONSAUL, partners trading as Moyers & Consaul.

No. 85.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

On behalf of the appellants, the Secretary of the Treasury, and the Treasurer of the United States, we desire to reply very briefly to the three grounds for the dismissal of the appeal set up in the appellees' motion.

16795—20

I.

These Appellants did not abandon in the Court of Appeals all points save the constitutionality of the fee limitation in Section 4 of the Act of March 4, 1915.

The Secretary of the Treasury and the Treasurer of the United States moved the Supreme Court of the District of Columbia to dismiss appellees' bill, not only on the ground of said fee limitation, which was alleged to be constitutional, but also upon the following additional grounds:

(*a*) The situs of the fund in question is not within the jurisdiction of the court.

(*b*) The court is without jurisdiction to restrain said officers in disbursing said fund.

(*c*) That said officers have no individual interest in the controversy; that the relief sought against them is in their official capacity only; that therefore the suit is in substance one against the United States and the property thereof, and is not within the jurisdiction of the court. (Rec. 18.)

A decree having been entered overruling this motion and ordering the officials of the Treasury Department to pay the money involved into the registry of the court, and providing for the recovery therefrom by the plaintiffs of a sum in excess of 20 per cent thereof (Rec. 19–20), an appeal was taken to the Court of Appeals and the failure of the Supreme Court to sustain the several points set up in the motion to dismiss was assigned as error,

these several points being stated in said assignment. (Rec. 21–22.)

When it came to the actual presentation of the appeal in that court, however, appellants were confronted with the fact that all points save the constitutionality of the fee limitation in the act of Congress were foreclosed by the former decisions of said court.

See *Sanborn* v. *Maxwell*, 18 D. C. App. 245.
Roberts v. *Consaul*, 24 D. C. App. 551.
Bryan v. *Curtis*, 26 D. C. App. 95.
Jones v. *Rutherford*, 26 D. C. App. 114.

The appellants, therefore, did not go through the futility of urging these points upon the Court of Appeals.

The points were, however, reserved by the assignment of errors and were apparent on the face of the record, and it can not be said that they were abandoned because not actively urged on a court which had many times decided them adversely.

These points are not stated in the opinion of that court; that court says, that the assignments of error only reserved that point—evidently treating the others as concluded by former decisions.

II.

Said points have not been waived in this Court.

The several objections to the jurisdiction set up in the motion to dismiss and in the assignment of errors in the Court of Appeals are repeated in the assignments of error in this court. (Rec. 42.)

Simultaneously with the appeal in this case the Government took an appeal in the case of *McAdoo* (now Houston) v. *Ormes*, which is No. 86 on the docket at this term, and which has already been argued and submitted.

The latter case involved all the points of the present case save the constitutionality of the act of 1915, and said points were argued in the Government's brief in that case. Rather than repeat the same argument in another brief at the same term, the Government in its brief in the present case adopted said arguments by reference.

If there is anything in the manner in which this was done which would indicate that said points were abandoned, we now disavow any such intention, and ask the court to consider said points and the argument in the brief in No. 86 as if it were set out herein.

III.

Both these appellants and the Government have an interest in the suit.

The effect of the decree in the present case is to compel the Secretary of the Treasury and the Treasurer of the United States to pay into the registry of the court a fund which they were authorized and directed by Congress to pay to a particular payee, in order that said fund may be disbursed in a manner forbidden by the act of Congress.

Having been thus impleaded it was open to the appellants in the lower court to interpose every available defense to the suit. Certainly the defense

that the relief asked for was prohibited by an act of Congress was open to them. So also was the defense that they could not pay the money to any other person than the one named in the appropriation. And the defense that the suit is in substance one against the United States is one which these officials could not themselves voluntarily waive. *Carr* v. *United States*, 98 U. S. 433.

It is submitted, therefore, that the appellants, the Secretary of the Treasury and the Treasurer of the United States, have the right to insist on all the assignments of error on the present appeal, and that the motion to dismiss should be denied.

ALEX. C. KING,
Solicitor General.
A. F. MYERS,
Attorney, Department of Justice.

MARCH, 1920.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

SUE ERSKINE NEWMAN, ADMINISTRATRIX of the Estate of Ursula Ragland Erskine, Deceased, Carter Glass, Secretary of the Treasury, and John Burke, Treasurer of the United States, Appellants, *v.* IDA M. MOYERS AND CHARLES F. CONSAUL, Partners Trading as Moyers and Consaul.	No. 85.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLANTS CARTER GLASS AND JOHN BURKE.

STATEMENT OF THE CASE.

This is a suit in equity by the appellees (hereinafter called plaintiffs) against Sue Erskine Newman, a resident of Virginia, the Secretary of the Treasury, and the Treasurer of the United States to control the payment, receipt, and distribution of a sum of money appropriated by Congress in satisfaction of a claim against the United States.

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Briefly stated, plaintiffs alleged that by written contract dated April 26, 1907, they were retained by Ursula Ragland Erskine and her co-claimants as attorneys to prosecute a claim against the United States for private property taken during the Civil War, and that said contract provided for the payment of a fee equal to 50 per cent of the amount recovered. (Bill of complaint, rec. 10–15.)

Plaintiffs further alleged that they diligently prosecuted said claim to judgment in the Court of Claims; and that thereafter Congress, by the act of March 4, 1915 (38 Stat. L., 962), appropriated the sum of $5,510 in satisfaction of the claim of Mrs. Erskine and her two co-claimants, being the amount found due by the Court of Claims.

The bill prayed, among other things, that the Secretary of the Treasury and the Treasurer of the United States be restrained from paying Defendant Newman the amount of Mrs. Erskine's share of the appropriation; and that they be required to pay the same into the registry of the court in order that it might be charged with the 50 per cent fee provided by the above contract.

It was not alleged that the defendant, Newman, purposes to defraud plaintiffs of a fee amounting to 20 per cent of the amount recovered as allowed by statute.

The controversy turned upon the provision of section 4 of said act of March 4, 1915, limiting the fees to be paid from the appropriation, or received therefrom by the attorneys for claimants, to 20 per cent of

the amount appropriated. This provision, which was declared by plaintiffs to be unconstitutional and void, and by defendants to be a valid act of legislation, reads as follows:

> That no part of the amount of any item appropriated in this bill in excess of twenty per centum thereof shall be paid or delivered to or received by any agent or agents, attorney or attorneys, on account of services rendered or advances made in connection with said claim.
>
> It shall be unlawful for any agent or agents, attorney or attorneys, to exact, collect, withhold, or receive any sum which in the aggregate exceeds twenty per centum of the amount of any item appropriated in this bill on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding $1,000. (38 Stat. L. 996.)

The Supreme Court of the District of Columbia overruled defendants' motion to dismiss and entered a decree substantially as prayed. (Rec. 19-20.) The Court of Appeals of the District (Justices Van Orsdel and Robb concurring and Chief Justice Smyth dissenting) affirmed the decree, holding the above provision to be unconstitutional. (Rec. 43-40; 47 D. C. App. 102.) The suit was begun against William G. McAdoo as Secretary of the Treasury, for whom Carter Glass was substituted by order of this court on October 13, 1919.

SPECIFICATION OF ERROR.

The Court of Appeals erred:

1. In deciding that the provisions of section 4 of the act of March 4, 1915, are unconstitutional.

2. In deciding that the court had jurisdiction to restrain the action of the Secretary of the Treasury and the Treasurer of the United States in disbursing said fund.

3. In deciding that the suit is not one against the United States.

4. In deciding that the fund was within the jurisdiction of the court. (Rec. 42.)

In *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208, decided June 2, 1919, this court had before it the very provision in question. That case involved a cross petition by a firm of attorneys in a proceeding in equity against the Capital Trust Company, as administrator, for an accounting. The cross petition contained allegations similar to those in the case at the bar; that the petitioners had been retained by the decedent to prosecute a claim against the United States under a contract providing for a fee amounting to 50 per cent of the amount collected; that said claim had been prosecuted to judgment in the Court of Claims and appropriation therefor made by the act of March 4, 1915; and that the amount of said appropriation less 20 per cent (received by petitioners under protest) was in the hands of said Trust Company, as administrator; and praying judgment for the remainder of their fee under said contract.

This court, therefore, was squarely confronted with the question as to the validity of section 4 of the act of March 4, 1915, and it was upon this question alone that the case was decided. Mr. Justice McKenna, in putting aside other contentions advanced in the case, said:

> We, however, need not dwell upon the distinctions (their soundness may be disputed) nor upon the contentions based upon them,

> because, as we have said, we consider the other proposition; that is, the power of Congress over the appropriated money and the limitation of payment out of it to an agent or attorney to 20 per cent of the claim, to be the decisive one. (P. 217.)

And in upholding the provisions of the act Mr. Justice McKenna, after summarizing the opposing contentions, spoke as follows:

> But there are other elements to be considered; there is the element of the condition Congress imposed on the subject matter of the controversy regarded as a condition of its grant. Relief could only be had through legislation. * * * A defect of remedy remained even after the court had been thus invoked and had reported the amount and facts of the claim. Further legislation was necessary, but it could not have been compelled; it was optional, not compulsory; and it would seem to require no argument to convince that the terms of its enactment must be taken as expressed and the relief it granted accepted with the condition imposed upon it. * * * The contention is that this can not be done, or, to put it another way, that the appropriation, though it could not be compelled, was yet subservient to the contract of Calhoun. * * * (Pp. 218–219.)
>
> The contention has no legal basis, and it may be said that it has no equitable one. Neither the justice nor the policy of what sovereignty may do or omit to do can be judged from partial views or particular instances. * * *

Whatever might have been the moving considerations, the power exercised must be sustained. (Pp. 219–220.)

While the defendants in the present case interposed other defenses besides insisting upon the constitutionality of section 4 of said act, and now assign as error the action of the lower court in overruling such defenses, it is evident that the decision of this court in the above-mentioned case, sustaining the constitutionality of said section, is determinative of the present case. The other contentions of the defendants will not, therefore, be urged in this brief; they are, however, set out in the brief for the appellants in No. 86, *Carter Glass et al.* v. *De Forrest L. Ormes, administrator.*

CONCLUSION.

It is submitted that the decree in this case should be reversed and the case remanded to the Supreme Court of the District of Columbia with directions to dismiss the bill.

ALEX. C. KING,
Solicitor General.
A. F. MYERS,
Attorney, Department of Justice.

NOVEMBER, 1919.

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